UPS Ground Freight, Inc. *and* Teamsters Local 773, petitioner. Case 04–RC–165805.

July 27, 2017

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The Employer's request for review of the Acting Regional Director's Decision and Direction of Election and Supplemental Decision on Objections to Election and Certification of Representative is granted as to the supervisory status of dispatcher Frank Cappetta. On review, and for the reasons explained below, we find that Cappetta was not a statutory supervisor. In all other respects, the Employer's request for review is denied as it raises no substantial issues warranting review.[1]

We agree with the Acting Regional Director that the Employer has not provided sufficient evidence to support its contention of objectionable prounion supervisory conduct by dispatcher Frank Cappetta. The Employer has failed to establish either that Cappetta was a statutory supervisor or that he engaged in conduct that would be objectionable if he were a supervisor.

The Employer asserts that Cappetta possessed the authority to assign and to hire, or effectively recommended hiring, new drivers. Although Cappetta's supervisory status was litigated at the preelection hearing, the Acting Regional Director did not address that evidence in his Supplemental Decision. Accordingly, we have reviewed the evidence adduced at the pre-election hearing and find, in agreement with the Acting Regional Director, that the Employer has failed to satisfy its burden of establishing that Cappetta was a statutory supervisor.

"[T]he burden of proving supervisory status rests on the party asserting that such status exists." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (quoting *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)); accord *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–713 (2001). To establish that Cappetta was a supervisor under Section 2(11) of the Act, the Employer must show that (1) Cappetta held the authority to engage in at least one of the 12 supervisory functions listed in Section 2(11) of the Act; (2) his exercise of such authority was not of a merely routine or clerical nature but required the use of independent judgment; and (3) his authority was held in the interest of the employer. See, e.g., *NLRB v. Kentucky River*, 532 U.S. at 711–713; *Oakwood Healthcare*, 348 NLRB at 687. The Employer can prove that Cappetta possessed the requisite supervisory authority either by demonstrating that he actually performed a supervisory function or by showing that he effectively recommended the same. *Oakwood Healthcare*, supra. Further, "to exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692–693. A judgment is not independent if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. at 693. Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Authority to Assign

In *Oakwood Healthcare*, the Board addressed the meaning of the term *assign* as that term is used in Section 2(11) of the Act. The Board explained that *assign* means "the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties" as opposed to ad hoc instructions that the employee perform a discrete task. *Oakwood*, 348 NLRB at 689. To demonstrate that a putative supervisor possesses authority to assign, there must be evidence that he or she "has the ability to *require* that

[1] In denying review, we agree with the Acting Regional Director that the Employer has failed to rebut the presumption that the petitioned-for single-facility unit of road drivers at the Employer's Kutztown, Pennsylvania facility is appropriate. See e.g. *Hilander Foods*, 348 NLRB 1200, 1200 (2006); *J&L Plate*, 310 NLRB 429, 429 (1993). We do not reach the question of whether the Board's test in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. *Kindred Nursing Center East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013), applies in the circumstances of this case.

In addition to alleging that Cappetta was involved in objectionable conduct, the Employer argues that Cappetta was engaged in conduct that tainted the showing of interest. We find that the Acting Regional Director properly resolved this allegation by administrative investigation. See *Winn-Dixie Stores, Inc.,* 124 NLRB 908 (1959).

We disagree with the dissent that review is warranted of the Hearing Officer's and Acting Regional Director's procedural rulings, which were well within their discretion to make. The rulings were not demonstrably unfair, and in any event, no prejudice has been shown. We also decline our colleague's invitation to relitigate the merits of the Board's Rule on Representation-Case Procedures, 79 FR 74308 (December 15, 2014). The time for extensive policy debate over the provisions of the rule has come and gone – the Board's rule was lawfully enacted, see *Associated Builders and Contractors of Texas, Inc. v. NLRB,* 826 F.3d 215 (5th Cir. 2016), and both we and our dissenting colleague are bound to faithfully apply it. The rule is not susceptible to alteration in an individual adjudication.

a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken." *Golden Crest Healthcare Center*, 348 NLRB at 729 (emphasis in original).

In this case, the record shows that during the year prior to the hearing, Cappetta spent approximately 80 percent of his time as a dispatcher, 10 percent as a safety instructor, and 10 percent as a road driver. In his role as dispatcher, Cappetta received an email each day from Advance Auto Parts, the Employer's sole customer, providing him with the dispatch schedule. The schedule detailed the routes to be driven and the stops to be made on those routes. Based on that information, Cappetta assigned drivers to routes. However, the majority of drivers are permanently assigned to a route, so Cappetta only assigned drivers to routes that did not have permanent drivers. In doing so, he relied primarily on driver preference, although he sometimes considered a driver's skills. For example, if Cappetta knew a driver was an experienced city driver, Cappetta would assign him to a New York City route. In the event that Cappetta assigned a driver to route the driver deemed undesirable, and the driver sought to reject it, Cappetta could switch the driver to another route if one was available. If another route was not available, Cappetta was required to direct the driver to a management official for resolution of the dispute. In addition, although Cappetta was involved in reassigning routes when there were "call outs" such as sick leave or vacations, drivers were required to contact a manager to report an absence. Similarly, while Cappetta recorded the drivers' vacation and sick leave requests in a daytime planner for scheduling purposes, he was not authorized to approve the requests but was instead required to refer them to a management official.

On days that there were more routes to be assigned than drivers, it was necessary to obtain temporary drivers from a third-party provider. The record establishes that to do so, Cappetta was required to notify the Kutztown facility's operations supervisor, who would then contact a third-party provider. From July to October 2015, the Kutztown facility did not have an operations manager or supervisor. During part of this time, Cappetta was required to secure a higher-level manager's approval before contacting a third-party provider to obtain temporary drivers. At some point, however, Cappetta was authorized to contact the providers without prior approval when temporary drivers were required. That authority was rescinded when the Employer hired an operations supervisor for the Kutztown facility.

Notwithstanding its contrary assertions, the Employer has failed to adduce evidence sufficient to establish that Cappetta's responsibilities as a dispatcher met the *Oakwood Healthcare* definition of the term *assign*. Cappetta did not prepare the drivers' daily work schedules or determine the routes to be driven or the stops to be made. Neither did Cappetta assign drivers to the majority of routes, which were well established and had permanent drivers. Although Cappetta was responsible for ensuring that all scheduled routes were covered, he did not have the authority to *require* a driver to accept a particular route. Rather, if a driver sought to reject a route and another route was unavailable, Cappetta was required to refer the driver to management.

Further, even assuming arguendo that Cappetta possessed authority to require drivers to accept the routes he assigned, he exercised no meaningful discretion in determining which routes to assign. In the limited circumstances in which it could be said that Cappetta assigned a driver to a route based on the driver's skills there is no evidence that Cappetta exercised judgment involving a degree of discretion that was more than routine. Drivers' established skill sets were largely determinative of what routes they would be assigned. For example, a driver with city-driving experienced would be assigned urban routes. See, e.g., *Shaw, Inc.*, 350 NLRB 354, 355 (2007) (designating employees to perform specific tasks "based on an employee's trade or known skills" in a way that is "essentially self-evident" does not entail the exercise of independent judgment); *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004) ("Assigning work to employees on the basis of their known job skills does not require the use of independent judgment.").[2] Accordingly, we find that there is insufficient evidence to establish that Cappetta exercised independent judgment in the assignment of significant overall duties to the Employer's Kutztown drivers. See *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075–1076 (1985) (dispatcher was not a supervisor because he did not exercise independent judgment in assigning work, he did not make initial route assignments, his direction of drivers involved no more than providing them with information from customers, and the act of issuing trailer numbers to drivers was simply ministerial or clerical); *St. Petersburg Limousine Service*, 223 NLRB 209, 210 (1976) (dispatchers did not exercise independent judgment in assigning vehicles and

[2] Nor did obtaining drivers from a third-party provider during the time the Kutztown facility was without an operations manager require the exercise of independent judgment. Rather, the evidence reflects that Cappetta simply followed instructions he had previously been given when prior management approval was required. Moreover, Cappetta's authority to obtain drivers from a third party was temporary, and it was rescinded prior to the hearing in this case.

directing drivers pursuant to company policies and a collective-bargaining agreement).

Authority to Hire

In addition to his responsibilities as a dispatcher, Cappetta also spent approximately 10 percent of his time working as a certified safety instructor. In this capacity, he was responsible for administering road and back-up tests to potential new hires, as well as performing semi-annual safety tests for current drivers, known as space and visibility rides. The record shows that in conducting these evaluations, Cappetta simply completed the appropriate forms and provided them to management. If a potential new hire failed one of the required tests, he or she could not be hired. Other than performing the requisite tests, Cappetta was not involved in the hiring process.

Based on this evidence, we find that Cappetta's role in conducting driver tests and reporting the results does not establish that he possessed authority to hire or to effectively recommend hiring, as the Employer contends. It is undisputed that the tests Cappetta administered are designed to determine the competence of potential new hires, and after administering a test he simply reported to management whether a driver had passed or failed. It was the test results, not a recommendation from Cappetta, that management used in deciding whether an applicant should be hired. On similar facts, the Board has found that administering tests to an applicant and reporting the results to management does not constitute effective recommendation to hire. See *Hogan Manufacturing*, 305 NLRB 806, 807 (1991) (conducting welding tests and reporting results to employer did not constitute recommendation to hire); *Pacific Beach Corp.*, 344 NLRB 1160, 1161–1162 (2005) (finding employee who conducted diving tests for prospective employees and reported the results was not a supervisor where employee's supervisor made the final decision to hire). In these circumstances, we find that the Employer has failed to sustain its burden of establishing that Cappetta possessed the authority to hire or to effectively recommend hiring.

Alleged Prounion Conduct

Even assuming for the sake of argument that Cappetta was a supervisor within the meaning of the Act, the Employer has failed to offer any evidence to show that Cappetta engaged in objectionable conduct. See *Harborside Healthcare,* 343 NLRB 906 (2004). To the contrary, the only instances of prounion conduct the Employer cites involve allegations that a union organizer called Cappetta's cell phone and that Cappetta made a prounion statement to a nonunit employee. Even if proven, such conduct would not be objectionable. See *Northeast Iowa Telephone Co.,* 346 NLRB 465 (2006) (even assuming prounion managers were supervisors, their attendance at union meetings and comments indicating that union could help resolve issues were not objectionable). For this additional reason, we find that the Acting Regional Director correctly overruled the Employer's objections insofar as they allege objectionable prounion supervisory conduct by Cappetta.

Dated, Washington, D.C. July 27, 2017

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting in part.

This representation-election case requires resolution of complex issues. The Union, Teamsters Local 773, filed a petition seeking to represent drivers, dispatchers and safety instructors at a distribution center located in Kutztown, Pennsylvania. However, the Employer, UPS Ground Freight (UPS), operates nine distribution centers that employ drivers, dispatchers and/or safety instructors, and all nine distribution centers—and their employees—are involved in work for its sole customer, Advance Auto Parts.[1] The disputed issues, which were the subject of a pre-election hearing, include (1) whether the Kutztown facility constitutes an appropriate single-facility bargaining unit, or whether an appropriate unit must include all nine of the UPS distribution centers; (2) whether the appropriate-bargaining-unit issue should be resolved by applying the Board's traditional "community of interest" criteria or the Board's decision in *Specialty Healthcare*;[2] (3) whether an allegedly prounion employee, Frank Cappetta, was a supervisor within the meaning of Section 2(11) of the Act and thus ineligible to vote; (4) if so,

[1] The nine distribution centers are located in Kutztown, PA; Enfield, CT; Lakeland, FL; Salina, KS; Gastonia, NC; Delaware, OH; Roanoke, VA; Hazlehurst, MS; and Thomson, GA. At all nine facilities, the UPS drivers and other employees are responsible for the delivery of Advance Auto Parts (Advance) products to retail stores operated by Advance within designated geographical areas.

[2] *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. *Kindred Nursing Center East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013). I have expressed my disagreement with the *Specialty Healthcare* standard. See *Macy's, Inc.*, 361 NLRB No. 4, slip op. 25–32 (2014) (Member Miscimarra, dissenting), enfd. 824 F.3d 557 (5th Cir. 2016).

whether Cappetta engaged in prounion supervisory conduct sufficient to taint the showing of interest and invalidate the election; (5) whether Cappetta and a second individual, Carl David, were dual-function employees who should be excluded from the unit on this basis; (6) whether the Acting Regional Director abused his discretion by directing a mail ballot election rather than a conventional manual election; and (7) whether procedural rulings by the Hearing Officer who presided over the pre-election hearing and/or by the Acting Regional Director, pursuant to the Board's Election Rule,[3] were contrary to Section 9(c) of the Act and violated the Employer's due process rights.[4]

I believe the Board should grant review regarding this last set of issues—involving procedural rulings resulting from application of the Election Rule—because substantial issues exist regarding the impact of the procedural rulings on the other issues being litigated. Moreover, in my view, these issues are serious enough to warrant Board evaluation of the challenged procedural rulings *and* corresponding provisions in the Election Rule. Indeed, given the expansive scope of the Election Rule, which took effect more than 2 years ago, it is timely for the Board to evaluate its practical impact, and this case provides an opportunity to do just that. Based on the record presently before the Board, I concur with my colleagues' disposition of the other issues listed above.[5] However, it is difficult to have confidence in the resolution of these other issues because the record presently before the Board was obviously affected by challenged procedural rulings that my colleagues decline to review.

To a significant degree, the request for review at issue here involves concerns similar to those I raised in *European Imports, Inc*., 365 NLRB No. 41, slip op. at 1–4 (2017) (Acting Chairman Miscimarra, dissenting). Like *European Imports*, this case "illustrates the downside associated with the Rule's 'preoccupation with speed between petition-filing and the election,'" which is reflected in the fact that the Election Rule "adopts a single-minded standard regarding what date should be selected when Regional Directors schedule an election: every election must be scheduled for 'the *earliest date practicable*. . . .'"[6]

In *European Imports*, the final election notice afforded many employees as few as *three days' notice* that they were eligible voters and would potentially be represented by a union, depending on the outcome of the election. That is not the problem in this case. The petition was filed on December 10, 2015; the election was conducted using mail ballots (which the Region deposited in the

[3] Representation-Case Procedures, 79 Fed. Reg. 74308 (December 15, 2014) (Election Rule).

[4] Sec. 9(c) of the Act states that, if the investigation of a representation petition reveals that reasonable cause exists to believe there is a question of representation, there must be "an appropriate hearing upon due notice," and the official who conducts the hearing "shall not make any recommendations with respect thereto." If it is found that a question of representation exists, Sec. 9(c) further states that the Board "shall direct an election by secret ballot and shall certify the results thereof." Although the Act makes the Board responsible for representation hearings, the Board has delegated to its regional directors—pursuant to Sec. 3(b) of the Act—its powers over representation elections. Nevertheless, Sec. 3(b) ensures the right of parties to request Board review of "any action of a regional director delegated to him [by the Board]."

Apart from its contention that the Election Rule violates Sec. 9(c) and constitutes a denial of due process as applied to this case, the Employer also contends that the Election Rule should be reconsidered by the Board. Together with former Member Johnson, I have previously expressed my disagreement with the Election Rule. 79 Fed. Reg. at 74430–74460 (dissenting views of Members Miscimarra and Johnson). The Employer also raises certain other challenges involving procedural and substantive rulings. These additional disputed rulings include, among others, the Acting Regional Director's failure to hold a hearing regarding the Employer's postelection objections; the denial of the Employer's request to issue subpoenas in the absence of a pending hearing; and the Acting Regional Director's failure to provide any analysis in support of his determinations regarding supervisor status under Sec. 2(11) of the Act. My colleagues grant review as to the latter issue only. Consistent with the analysis set forth herein, I believe the Board should grant review as to all these rulings based on the importance of determining whether the Region's reliance on the Election Rule deprived the Employer of a reasonable opportunity to address relevant issues, arguments, and authority and to assemble and introduce witness testimony and documentary evidence in support of its position.

[5] I do not, however, reach or pass on whether Cappetta is a statutory supervisor because his ballot was not outcome-determinative (the tally of ballots showed 27 votes for and 1 vote against the Union, with 2 challenged ballots), and the record presently before the Board does not establish that conduct by Cappetta would be objectionable even if he were found to be a supervisor under Sec. 2(11) of the Act. Also, in finding that the Acting Regional Director correctly overruled the Employer's objection challenging the denial of its request for subpoenas, I would rely solely on the Employer's failure to establish a prima facie case in support of its objections. Absent a prima facie case, a hearing was not warranted, and "[a] party's right to subpoena attaches only after the Board determines that there exist substantial and material factual issues that warrant a hearing." See *Park Chevrolet-Geo, Inc*., 308 NLRB 1010, 1010 fn. 1 (1992).

[6] *European Imports*, supra, slip op. at 1, quoting Election Rule, 79 Fed. Reg. at 74436 (dissenting views of Members Miscimarra and Johnson), and Board's Rules and Regulations Sec. 102.67(b), 79 Fed. Reg. at 74485 ("The regional director shall schedule the election for the earliest date practicable consistent with these rules.") (emphasis added). The Board majority in the Election Rule refused to take any position regarding what constitutes an appropriate overall period for a post-petition election campaign—i.e., an appropriate minimum and maximum period of time between petition-filing and election. The Election Rule's failure to provide *any* guidance regarding the "speed" issue, instead requiring Regional Directors to hold every election at "the earliest date practicable," Board's Rules and Regulations Sec. 102.67(b), 79 Fed. Reg. at 74485, was a substantial reason that former Member Johnson and I could not support the Rule. See 79 Fed. Reg. at 74435–74436, 74459 (dissenting views of Members Miscimarra and Johnson).

mail on January 11, 2016); and the ballots had to be received by the Region no later than January 29, 2016.[7] Consequently, there were 50 days between petition-filing and the deadline for returning ballots.[8] This case involves a different set of problems that result from the Election Rule's preoccupation with having elections occur on the "earliest date practicable." The Hearing Officer and/or Acting Regional Director made numerous procedural rulings, each based on the Election Rule, and I believe the Employer's request for review raises substantial issues warranting review to determine whether the disputed rulings were unfair, arbitrary, contrary to the Act, and a denial of due process. Some examples include the following:

- *Accelerated Procedures During Employer's Busiest Time of Year*. The petition, hearing, and election spanned the year-end holiday season, arguably one of the busiest periods of the year for the Employer and its employees, since the Employer's business involves the delivery of products to retail stores.
- *Required Position Statement on the Seventh Day*. Again, the representation petition was filed on December 10, 2015, and under the Election Rule the non-petitioning party (here, the Employer) was required to file and serve a comprehensive Statement of Position no later than noon on December 17, 2015 (the seventh day after petition-filing). The Election Rule imposes no requirement on the petitioning party (here, the Union) to file a Statement of Position before the hearing.
- *Required Hearing on the Eighth Day*. Under the Election Rule, the hearing was to commence on December 18, 2015 (the eighth day after petition-filing).
- *Denial (in Part) of Requested Extensions*. Considering the complexity of the issues and the timing of the petition, the Employer sought a very modest extension of these deadlines, requesting an additional two business days to file the Statement of Position (from Thursday, December 17 to Monday, December 21),[9] and an additional two business days until the hearing commenced (from Friday, December 18 to Tuesday, December 22). In spite of the reasonableness of these requests, the circumstances that warranted granting them, and the fact that the Election Rule allows such requests to be granted for "special circumstances,"[10] the Acting Regional Director denied the requests and approved only a one-business-day extension of both the Statement of Position (making it due at 10:00 a.m. Friday, December 18) and the hearing (to commence Monday, December 21, only four days before Christmas).
- *Refusal to Carry Over Hearing to Second Day.* The Election Rule provides that the hearing, once commenced, "shall continue from day to day until completed."[11] However, toward the end of the first (and only) day of the hearing, the Hearing Officer denied the Employer's request to adjourn the hearing until the following day. Hearing testimony continued until approximately 7:00 p.m., at which point the Employer requested an adjournment so the parties could prepare overnight for oral arguments to be presented the following morning, and this request was denied.
- *Limited Preparation Time for Oral Arguments*. The Election Rule provides that "any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument."[12] When the Hearing Officer denied the Employer's request to adjourn the day-long hearing at approximately 7:00 p.m., she gave the parties only 30 minutes to prepare their oral arguments, notwithstanding the Employer's objection that this was insufficient given the complexity of the case and the parties' inability to refer to a hearing transcript.[13]

[7] The ballots were to be counted on February 1, 2016.

[8] There were 32 days between petition-filing and the mailing of ballots.

[9] The requested 2-business-day extension of the statement of position deadline would have made the Statement of Position due on Monday, December 21 (4 calendar days after December 17), because Saturday and Sunday (December 19 and 20) were not business days. The Election Rule permits postponements longer than 2 business days only under "extraordinary circumstances." Id.

[10] See Board's Rules and Regulations Sec. 102.63(b)(1), (2), and (3), 79 Fed. Reg. at 74481–74482.

[11] Board's Rules and Regulations Sec. 102.64(c), 79 Fed. Reg. at 74482.

[12] Board's Rules and Regulations Sec. 102.66(h), 79 Fed. Reg. at 74484.

[13] The oral argument made by the Employer's counsel focused entirely on the procedural limitations that, according to counsel, were unfair, contrary to the Act and a denial of due process. In its entirety, the Employer's oral argument consisted of the following:

> Madam Hearing Examiner, . . . we have requested to file post-hearing briefs; that request was summarily denied. We have requested to present oral argument tomorrow morning after an overnight recess to allow us to prepare; that request was also denied.
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> As everyone knows, the Union saw our written proffer and summary of evidence as set forth in our extensive position statement on Friday, presumably by midday. We did not have that opportunity, and the first the Employer heard of the Union's evidence was this afternoon when it was put into the record at the hearing.

- *Refusal to Permit Post-Hearing Briefs*. The Election Rule all but eliminated post-hearing briefs, stating that they may be filed "only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director."[14] Here, in addition to denying the Employer's request that the pre-election hearing be continued to the following day, thereby providing the Employer more time to prepare a closing argument, the Acting Regional Director denied the Employer's request for special permission to file a post-hearing brief.

It is important for the Board to promptly resolve election-related issues, and I completely support having the Board conduct elections in a timely manner.[15] Indeed, the Board has long done so: before the Election Rule was adopted, it adhered to a well-known target of having elections take place within a median of 42 days after petition-filing, and the Board had an enviable track record of conducting more than 90 percent of elections within 56 days after petition filing.[16] Here, as previously noted, the deadline for returning mail ballots was 50 days after petition filing. Therefore, the application of the Election Rule to this case did not result in an election timeframe that was tighter than the Board's pre-Election Rule benchmarks. Even so, two aspects of the Election Rule's impact on this case remain noteworthy.

First, this case demonstrates that the Election Rule's extensive changes to the Board's preelection procedures inevitably draw parties into a game of "hurry up and wait." The petition here was filed on December 10, 2015, and the deadline for returning mail ballots was January 29, 2016 (which, as noted above, was 50 days after petition filing). Yet, *more than 17 additional months have now passed*, and the parties still have not obtained any definitive resolution of issues arising from the election. As the Board's decision reflects, this delay was at least in part due to the need to address important issues that were not resolved in the Regional Director's Supplemental Decision. Worse, because my colleagues deny review on most issues the Employer raises, the parties here—and most parties in other election cases[17]—will *never* obtain a definitive resolution from the Board as to the issues the Board does not address, and any meaningful postelection review will only be available in the courts, which defeats the purpose of mandating that elections occur on the "earliest date practicable." Former Member Johnson and I predicted this outcome in our Election Rule dissenting views, where we stated:

> We have had no fair opportunity to review the transcript, to prepare a brief or make argument based on application of the law to the facts. We've been here since before 10:00 a.m. when the hearing was supposed to convene. It's now after 7:00 p.m. Except for a 30-minute lunch recess, we've been at it now for close to 9–1/2 hours. We are being denied a fair hearing. This is not a fair opportunity to make a closing argument. It is a denial of due process. And I second my colleague's comments about the nature of that deliberate denial of due process.
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> Giving us 30 minutes to "prepare" a closing argument is not a fair substitute for the type of preparation we've been denied. We're not going to allow the Regional Director to claim that we were given an opportunity to make reasonable or meaningful oral argument under the circumstances. It is a sham and it's a denial of due process.
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> So I will reiterate the comment we're being denied a fair hearing. We're being denied a fair opportunity to make argument based on a review of the transcript, and an opportunity to sit down and think about how to apply the law to the facts; so we're not given a fair opportunity.
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> So all I can say at this point is that we reiterate all of the objections we've made. We reiterate the points we made in of statement of position [sic]. And we rely on the evidence and the arguments made in case today. And it would be meaningless to try to make further oral argument under the circumstances. So that's all we have to say. We're not going to . . . play the game by claiming that this constitutes any fair or meaningful opportunity to make closing argument.
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> Thank you very much.

[14] Board's Rules and Regulations Secs. 101.30(c), 102.66(h), 79 Fed. Reg. 74477, 74484. See also 79 Fed. Reg. 74401–74403. Prior to the Election Rule's adoption, the Board's regular practice was to permit parties to file posthearing briefs, which in the overwhelming majority of cases were due 7 days after the hearing's conclusion. See 79 Fed. Reg. 74401 ("[U]nder [prior] §§ 102.67(a) and 101.21(b), in nearly all cases parties [were] afforded a right to file briefs at any time up to 7 days after the close of the hearing, with permissive extensions granted by hearing officers of up to 14 additional days."). The Election Rule ostensibly continued to permit posthearing briefs by vesting "the regional director with discretion to grant a request to file a post-hearing brief in amended § 102.66(h)." Id. However, the reality is that regional directors—who are required by the Election Rule to schedule elections at the "earliest date practicable" (Board's Rules and Regulations Sec. 102.67(b), 79 Fed. Reg. at 74485)—now routinely dispense with posthearing briefing, as happened here.

[15] See 79 Fed. Reg. at 74459 (dissenting views of Members Miscimarra and Johnson) (favoring a minimum period of 30 or 35 days and, with few exceptions, a maximum period of 60 days after petition-filing for all elections).

[16] 79 Fed. Reg. at 74434 (dissenting views of Members Miscimarra and Johnson).

[17] Board review of preelection disputes has long been discretionary, but the Election Rule made Board review of postelection disputes discretionary in all cases—both where elections are conducted pursuant to a regional director's decision and direction of election and where they are conducted pursuant to a stipulated election agreement—except where objections or ballot challenges are consolidated with unfair labor practice charges for hearing before an administrative law judge. Board's Rules and Regulations Sec. 102.62(b), 79 Fed. Reg. at 74479; Board's Rules and Regulations Sec. 102.69(c)(2), 79 Fed. Reg. 74487. Previously, parties were guaranteed Board review of postelection disputes if they entered into a Stipulated Election Agreement. See 79 Fed. Reg. at 74449–74450 (dissenting views of Members Miscimarra and Johnson).

> [T]he Final Rule makes elections occur more quickly—by eliminating time for reasonable preparation, by adopting new, accelerated pleading requirements [the Statement of Position] applicable only to employers, by dispensing with post-hearing briefs, and by deferring until following the election evidence regarding issues as fundamental as who can vote, for example—but our colleagues do not adequately address the likelihood that *the overall time needed to resolve postelection issues will increase, as will the number of rerun elections*.[18]

Second, the more serious problem caused by the Election Rule's procedural shortcuts involves the risk that, as here, they may produce an outcome that is unfair, arbitrary, contrary to the Act, and a denial of due process. The election in this case involves complex factual and legal issues, including a question that the Board has not previously addressed (whether the *Specialty Healthcare* "overwhelming community of interest" standard applies in determining whether a party has rebutted the presumptive appropriateness of a petitioned-for single-facility bargaining unit). At some point, at least in certain cases, a party's substantive rights to litigate its case in Board proceedings are infringed upon by (i) dramatically accelerating litigation timetables; (ii) denying reasonable requests for modest extensions of time; (iii) giving the party a mere 7 days (extended here by one business day) to prepare a comprehensive Statement of Position; (iv) giving the party a mere 8 days (also extended here by one business day) to prepare and present testimony and documentary evidence in a hearing; (v) requiring a party to participate in the hearing for an extended period of time, on a single day, beyond normal business hours; (vi) denying a party's request to adjourn the hearing, at roughly 7 p.m., in order to permit the party to prepare its oral argument overnight; and (vii) giving a party a mere 30 minutes, at the end of a long hearing day, to prepare its oral argument. I do not prejudge these matters, but they are important enough, in my opinion, to warrant Board review.

Accordingly, as to the above issues, I respectfully dissent.

Dated, Washington, D.C. July 27, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

[18] Election Rule, 79 Fed. Reg. at 74434–74435 (Members Miscimarra and Johnson, dissenting) (emphasis added).